

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: D.G.

Date of Birth: [redacted]

Date of Hearing: January 4, 2012

CLOSED HEARING

ODR File No. 2524/1112AS

Parties to the Hearing:

Representative:

Parent

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Date Record Closed:

January 9, 2012

Date of Decision:

January 24, 2012

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a high school-aged student in the Allentown City School District (District). Student's Parent filed a due process complaint against the District in November 2011, asserting that it denied Student a free, appropriate public education (FAPE) under Individuals with Disabilities Education Act (IDEA)² in failing to identify Student as a child with a disability who is eligible for special education.

The case proceeded to a due process hearing which convened over one session. The Parent claimed that the District's educational evaluation of Student in the fall of 2011 was not appropriate, and she sought an Independent Educational Evaluation (IEE) at public expense as well as compensatory education. The District maintained that its evaluation was appropriate in concluding that Student was not a child with a disability.

For the reasons set forth below, I find in favor of the Parent on the claim for an IEE but in favor of the District on the remaining claims.

ISSUES

1. Whether the District properly concluded that Student is not a child with a disability and eligible for special education;
2. Whether the Parent and Student are entitled to an IEE at public expense; and
3. Whether Student is entitled to compensatory education.

FINDINGS OF FACT

1. Student is a high school-aged student who resides within the District. Student currently attends a cyber charter school. (Notes of Testimony (N.T.) 23)
2. Student was first enrolled in the District in December 2008 in sixth grade. During the 2009-10 school year (seventh grade), Student was disciplined on approximately 16 occasions, receiving detention or suspension for incidents involving conflict with other students (improper language), insubordination, hallway misbehavior, disrespect toward staff, threatening school officials or students, and disruption of education process.

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² 20 U.S.C. §§ 1400 *et seq.*

Student served over 35 days of suspension that school year. (N.T. 25-28; Parent Exhibit (P) 2)

3. Student was also placed in the Alternative Learning Center (ALC) [redacted] at the end of the 2009-10 school year. The ALC [redacted] is a class of students in sixth, seventh, and eighth grades who exhibit a pattern of disruptive behavior. The ALC classroom has a classroom behavior system, and a student's work is sent to the ALC by his or her teachers. This placement occurred after a meeting of Student's Parent and several District personnel. (N.T. 29-32, 86-88, 101-02)
4. [Redacted] Student's behavior was also discussed at a meeting [redacted], but no assessment of those behaviors was undertaken. (N.T. 64, 80-81, 102-04; School District Exhibit (S) 4 p. 12)
5. Student started the 2010-11 school year (eighth grade) in the regular education environment. Student was disciplined on approximately 22 occasions that school year for improper language, disrespect to staff, hallway misbehavior, acceptable use policy violation (use of computer), disruption of education process, and insubordination, as well as for [other behaviors]. The police were called for the latter incidents and filed criminal charges. Student served approximately 38 days of suspension that school year. (N.T. 32-33, 44-45; P 3)
6. Student was again placed in the ALC during the 2010-11 school year between January 3 and January 25, 2011; between February 28 and April 6, 2011; between April 15 and April 18, 2011; and between May 2 and May 18, 2011. (N.T. 35; S 4 pp. 3-7)
7. The Parent requested, and the District convened, a meeting in March 2011 to discuss Student's behavior, poor grades, and the work Student was provided in the ALC placement. (N.T. 39-41)
8. Sometime in April 2011, District personnel discussed the Student Assistance Program (SAP) with the Parent, but it was not pursued. The Parent requested a special education evaluation around this time. (N.T. 44-45, 62-64)
9. In May 2011, a plan was developed to provide Student with an opportunity to go to the office to speak with a counselor or other adult when Student began to get upset. The Parent also signed a permission to evaluate form on May 6, 2011. (N.T. 42-43, 45, 67-68, 140-43, 146, 150; S 3)
10. [Following an incident early in the school year] Student was suspended. Student did not return to school and instead enrolled in the charter school. (N.T. 45-47, 55)
11. The District issued an Evaluation Report (ER) in September 2011. The ER included cognitive and academic assessment, behavioral information, and a classroom observation. Student's disciplinary records were also reviewed. Two different school psychologists participated in the evaluation because Student and the first school psychologist did not have a good rapport. (N.T. 68, 82-86, 100-01, 113, 115-17, 124, 127-28; S 4)

12. Behavioral and emotional assessment was conducted through the Scales for Assessing Emotional Disturbance – Second Edition (SAED-2) and the Behavior Assessment System for Children – Second Edition (BASC-2). (S 4)
13. One of the school psychologists conducted a classroom observation and used the BASC-2 Student Observation System with respect to Student's adaptive behaviors and problem behaviors. During the 15-minute observation while the class watched a movie, Student was on-task 80% of the time and off-task 20% of the time, engaging in nine peer interactions and six inappropriate vocalizations. (S 4)
14. The ER included a summary of Student's disciplinary referrals from the 2009-10 and 2010-11 school years. (S 4 pp. 8-10)
15. Cognitive assessment using the Kaufmann Assessment Battery for Children, Second Edition reflected average scores on all scales except Crystallized Ability which was in the low average range. Student's overall score on the Fluid-Crystallized Index was also in the average range. (S 4 pp. 13-14)
16. The Kaufman Test of Educational Achievement, Second Edition was also administered and reported in the ER. Student scored in the average range on the Reading and Mathematics Composites as well as on all subtests in those areas. (S 4 pp. 14-15)
17. Student's report card grades for eighth grade were also included in the ER, and final grades were: A in English, Bs in Health, German, Music, Physical Education, Reading, Science, and U.S. Citizenship, C in Pre-Algebra, D in Art, and Fs in Spanish and Technical Education. Student scored in the Proficient range in both Mathematics and Reading in eighth grade on the Pennsylvania Statewide System of Assessment. Teacher input reflected strengths in leadership skills, intellectual ability, and writing skills; and needs in behavioral control, respecting authority and rules, and healthy peer and adult interactions. (S 4 p. 10)
18. Results of the BASC-2 revealed scores in the clinically significant range by all of Student's teachers on the Hyperactivity, Aggression, and Conduct Problems Scales, as well as the Anger Control, Bullying, Emotional Self-Control, Executive Functioning, and Negative Emotionality Scales. They all also reflected scores in the at-risk or clinically significant range on the Attention Problems and Adaptability Scales. There were other at-risk scores by two or more teachers on the Depression, Social Skills, Functional, and Adaptive Skills Scales, as well as on the Resiliency Scale. Student's Parent's scores were in the at-risk range on the Conduct Problems and Executive Function Scales. Student's Self Report included scores in the clinically significant range on the Hyperactivity Scale and in the at-risk range on the Somatization Scale. (S 4 pp. 15-17)
19. On the SAED-2, the ER reported elevated scores on the Inappropriate Behavior Subscale, with a number of problematic behaviors noted by the teachers. (S 4 pp. 18-19)
20. A summary of Student's behavior according to the classroom behavior system in the ALC placement during the 2010-11 school year was also reported in the ER. Student demonstrated a variety of problematic behaviors in the ALC including cursing and

inappropriate language, failing to follow directions and complete tasks, interactions with peers, cooperation, and flipping desks over. (S 4 pp. 3-8)

21. A Functional Behavioral Assessment (FBA) was planned for September 2011 but was not completed because Student left the District. (N.T. 84; S 4 pp. 8, 21)
22. The District's ER concluded that Student was not eligible for special education. (N.T. 74, 76, 93-96, 124-25, 127-28; S 4)
23. A meeting convened to discuss the ER at the beginning of the 2011-12 school year. The Parent advised the District at that time that Student would not be returning to the District and Student's eligibility for special education was therefore not discussed. (N.T. 60, 68-71, 76, 123-24, 130, 143)
24. Student was evaluated by a private psychologist in December 2011 to determine whether Student had any psychological disorders and was in need of treatment for the behavioral difficulties. The private psychologist diagnosed Student with Conduct Disorder and Intermittent Explosive Disorder and recommended therapy. (N.T. 49, 51-54; P 1)³
25. The District's school psychologists reviewed the private psychologist's report but did not change its conclusion that Student was not eligible for special education. (N.T. 93-94)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁴ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a

³ The District objected to the private evaluation report (P 1) and ruling on its admission was reserved. (N.T. 49-50, 90, 156) While the District's objection is noted, this hearing officer finds that this document is relevant, and as an evaluation report offered into evidence without the testimony of the author, it speaks for itself. The document is hereby admitted, and was reviewed with the understanding that it was not an educational evaluation. (*Id.*) P 2-4 and S 1-8 were also admitted into evidence. (N.T. 156-57)

⁴ The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent on matters which were critical to resolution of the issues presented.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as child find. Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

In conducting the evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate

information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals *and the parent of the child* determines whether the child is a child with a disability[.]” 34 C.F.R. § 300.306(a)(1) (emphasis added).

The Parent contends that the District improperly failed to identify Student as eligible for special education and that its evaluation process was not appropriate under the law. After careful review of the record, this hearing officer concludes that the District's evaluation was not sufficient in several respects. Nevertheless, it merits mention that, among other things, the District's ER was timely; included a variety of assessment tools and assessments; and used technically sound instruments designed to assess appropriate factors. (Findings of Fact (FF) 11, 12, 15, 16, 18, 19; 22 Pa. Code § 14.123(b)) The appropriate attributes of the evaluation, however, cannot overcome several important deficiencies in this case.

First, while all of Student's teachers reported difficulties with behavioral control, respecting authority and rules, and healthy peer and adult interactions, there was little discussion of these concerns; instead, the ER stated that Student "has shown appropriate behavior in the classroom" and suggested that when Student wants to behave appropriately, Student does so. (S 4 p. 11) This evaluation followed an alarming number of disciplinary incidents and ALC placements over the 2009-10 and 2010-11 school years which culminated in criminal charges. (FF 2, 3, 5, 6) Although the behavioral incidents were reviewed during the course of the evaluation, this hearing officer is not convinced that they were thoroughly considered as part of the eligibility determination, particularly with respect to their impact on Student's access to the educational curriculum. (*See, e.g.*, N.T. 97-101, 128; S 4 p. 21) A classroom observation of Student was certainly an appropriate method of gaining a more thorough understanding of Student's problematic behavior in the classroom, particularly since an FBA could not be performed (FF 21); however, this observation lasted only fifteen minutes and occurred while the students were watching a movie rather than during a typical classroom activity (FF 13), yielding limited useful information. Of further concern is the fact that the results of the BASC-2 were

rather summarily dismissed on the basis that Student was displaying characteristics similar to “social maladjustment” (S 4 p. 21), under the apparent assumption that a student cannot be both socially maladjusted and emotionally disturbed. (*Id.*) This conclusion lacks foundation in the regulations which specifically provide that a student who is socially maladjusted may have an emotional disturbance if other criteria are met.⁵

It is also of particular significance that the Parent was not provided with an opportunity to meaningfully participate in the decision of whether Student was a child with a disability. (FF 22, 23) While the circumstances here suggest that there are reasons that the District did not do so (FF 10, 23), this fact combined with the above concerns with the District’s ER compel the conclusion that the District did not fully and adequately consider Student’s eligibility for special education when it completed its ER. As such, the evaluation must be determined to be inappropriate. Having so concluded, this hearing officer will award an IEE of Student at public expense to determine whether Student is a “child with a disability” and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); 34 C.F.R. § 300.502.

The Parent’s remaining claims seek a determination that Student is eligible for special education and should be provided with compensatory education to remedy a denial of FAPE. This hearing officer finds that the Parent has not met her burden of establishing either of these forms of relief. Having found deficiencies in the District’s evaluation, there is insufficient information available at this time to determine whether Student has an emotional disturbance,

⁵ An emotional disturbance “means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance” including “[a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers” and “[i]nappropriate types of behavior or feelings under normal circumstances.” 34 C.F.R. § 300.308(b)(4)(i). Emotional disturbance “does not apply to children who are socially maladjusted, *unless it is determined that they have an emotional disturbance[.]*” 34 C.F.R. § 300.308(b)(4)(ii) (emphasis added).

and it remains to be seen whether, following a comprehensive IEE, Student meets the criteria for eligibility under the IDEA. Moreover, while the record suggests that the District might have evaluated Student earlier than it did, there was no evidence presented from which to conclude that Student was denied FAPE, a necessary element of a claim for compensatory education. Accordingly, this hearing officer will not order these remedies.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the Parent and Student are entitled to an IEE at public expense, but that there is no basis to determine that Student is eligible for special education or that compensatory education is warranted.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Parent and Student are entitled to an IEE at public expense. The IEE shall be comprehensive and shall be conducted by a Pennsylvania certified school psychologist selected by the Parent, provided that the evaluator meets requisite agency criteria. 34 C.F.R. § 300.502.
2. The District is ordered to take no further action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: January 24, 2012